UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

BGC PARTNER'S, INC.,

and **Case 28-CA-195500**

PATRICK THURMAN, an Individual

CANTOR FITZGERALD, LP

and **Case 28-CA-195506**

PATRICK THURMAN, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

BGC Partners, Inc. (Respondent BGC) and Cantor Fitzgerald, LP (Respondent Cantor) (collectively Respondents), through their shared Employee Handbook, maintain 5 overly broad and coercive rules in effect at their respective locations nationwide.[1] The 5 overly broad and coercive rules impede employees from engaging in a wide variety of conduct protected by Section 7 of the National Labor Relations Act (the Act) in violation of Section 8(a)(1) of the Act.

The National Labor Relations Board (the Board) is charged with "preventing employees from being chilled in the exercise of their Section 7 rights . . . instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it."[2] In furtherance of this aim, the Board has held that when evaluating rules that, when reasonably interpreted, would potentially interfere with employees' rights under Section 7 of the Act, it will balance the nature and extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule.[3] In conducting this balancing, "when a rule, reasonably interpreted, *would* prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful."[4] The rules maintained in Respondents' Employee Handbook, when reasonably interpreted, prohibit employees from engaging in protected activities, and Respondents have failed to assert any business justifications for the rules that outweigh their impact on employees' Section 7 rights.

Counsel for the General Counsel (CGC) requests the Administrative Law Judge (ALJ) issue a recommended Order requiring Respondents to cease and desist from maintaining overly-

[1] *See* Joint Exhibit 2 for a list of Respondent Cantor's entities as noted in Table A and a list of Respondent BGC's entities as noted in Table B.

[2] *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), *aff'd in relevant part*, 746 F.3d 205 (5th Cir. 2014).

[3] *The Boeing Co.*, 365 NLRB No. 154, slip op. at 3 (2017).

[4] *Id.* at slip op. at 16.

broad and discriminatory work rules, to rescind the rules, and to post and distribute remedial notices at all of their respective facilities nationwide to cure all un-remedied unfair labor practices and to ensure employees the rules are no longer in effect.[5]

II. STATEMENT OF THE CASE

These cases are before ALJ Jeffrey Wedekind upon the General Counsel's Complaint alleging that Respondents violated Section 8(a)(1) by maintaining overly-broad and discriminatory rules in their Employee Handbook.[6] Patrick Thurman (the Charging Party)[7] filed the original charges in cases 28-CA-195500 and 28-CA-195506 on March 24, 2017, and filed the amended charges in each case on August 1, 2017.[8] The Regional Director for Region 28 issued a Complaint and Notice of Hearing in each case based on the respective charges and amended charges on August 31, 2017.[9] Respondents filed timely Answers to the Complaints denying, among other things, all allegations related to the maintenance of the work rules at issue.[10]

The ALJ heard this case on June 20, 2018, in Phoenix, Arizona. At the hearing, the ALJ granted General Counsel's motion to amend the Complaints as described on the notices of intent to amend the complaints,[11] and amending paragraph 3 of the Complaints by adding Respondents' Director of Human Resources Lindsey Sherman to the list of Respondents' alleged supervisors

[5] *See Guardsmark, LLC*, 344 NLRB 809, 812 (2005) ("Concerning the scope of notice posting, we have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect."), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

[6] As used herein, the numbers following the abbreviation "Tr." refer to the page numbers of the transcript, "GC" refers to General Counsel's exhibits, "R" refers to Respondents' exhibits, and "Jt." Refers to joint exhibits.

[7] Thurman was employed by Respondent BGC as a supervisor at Respondent BGC's facility at the University of Arizona science and technology park in Tucson, Arizona. *See BGC Partners, Inc. d/b/a Newmark Grubb Knight Frank and Patrick Thurman*, JD–31–17 (Administrative Law Judge Robert Ringler, 2017).

[8] GC Exh. 1(a), 1(b), 1(c), 1(d), 2(a), 2(b), 2(c), and 2(d).

[9] GC Exh. 1(e), 1(f), 2(e), and 2(f).

[10] GC Exh. 1(g) and 2(g).

[11] GC Exh. 1(q), 2(q), and 2(r)

and agents.[12] Though Respondents admitted to Sherman's status as an agent,[13] Respondents were permitted by the ALJ to respond to the Complaints, as amended, after the hearing.[14] Respondents filed their respective answers to the Complaints, as amended, on July 5, 2018.

III. STATEMENT OF THE ISSUES

Whether Respondents' maintenance of the following rules in their Employee Handbook[15] interferes with, restrains, or coerces employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act:

1) Confidentiality notice footnoted on the title page and each page of the Employee Handbook;
2) 403 Reference Inquiries and Requests for Employee Information;
3) 804 Press Inquiries and Other Information Requests;
4) 805 Cooperation in Investigations and Litigation;
5) 811 Personal Appearance Policy.

IV. STATEMENT OF THE FACTS

A. Respondents' Operations

It is undisputed that, at all material times, Respondent Cantor has been a limited partnership with affiliated entities nationwide, including, but not limited to, Cantor Fitzgerald & Co. with an office and place of business in the State of Nevada, and Respondent BGC has been a corporation with affiliated entities nationwide, including, but not limited to, BGC Real Estate of Arizona, LLC, with an office and place of business in the State of Arizona.[16] Respondent BGC's entities provide commercial real estate services and financial services.[17] Respondent Cantor's

[12] Tr. 8-10.

[13] Tr. 10.

[14] Tr. 17-19.

[15] Jt. Exh. 1, the Employee Handbook names three entities Respondent BGC, Respondent Cantor, and Newmark Grubb Knight Frank which recently changed its name to Newmark Knight Frank. *See* Tr. 9.

[16] *See* Jt. Exh. 2.

[17] Tr. 35.

entities primarily provide financial services,[18] though some entities do not provide financial services, such as Delivery.com, LLC which provides food delivery services.[19] Respondents' joint Employee Handbook is in effect and applies to the all employees at numerous facilities of Respondents' affiliates nationwide.[20] The types of employees at the facilities of Respondents' affiliates nationwide include, among others, engineers, maintenance workers, property and facility management, corporate services, project management, construction management, administrative support, groundskeepers, security guards, consultants, tech support, advisors, and brokers.[21] It is also undisputed that, at all material times, Respondents' affiliates have been employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.[22]

B. Respondents' Employee Handbook

Since at least on or before May 1, 2014, Respondents have distributed their joint Employee Handbook to all of their employees.[23] The Employee Handbook's rules, policies, and guidelines apply to all employees of Respondents' affiliates and are in effect at all of the facilities of Respondents' affiliates nationwide.[24] Respondents have edited their joint Employee Handbook a few times to revise the sick time policy to accommodate a change in local laws in San Francisco, California in October 2015,[25] to revise the parental leave policies in February 2018, and to update the cover page to remove the name Grubb from Newmark Grubb Knight

[18] Tr. 35-36.

[19] Tr. 74.

[20] Tr. 77; *see* Jt. Exh. 2.

[21] Tr. 77-80.

[22] Jt. Exh. 2.

[23] Tr. 37-38, 54, 77; *see also* Jt. Exh. 1.

[24] Jt. Exh. 2.

[25] Tr. 56.

Frank.[26] The Employee Handbook is divided into eight sections which include an introductory section, a section on ethics and compliance, and a section on security and protection of assets, among others.[27] The policies in Respondents' joint Employee Handbook which are at issue in this case, namely the footnote marking the handbook as confidential, rules 403, 804, 805, and 811, have not been modified, revised, or rescinded since May 2014 and remain in effect.[28]

The potential punishment associated with a violation of the rules in Respondents' Employee Handbook ranges from counseling up to, and including, termination of employment.[29] In addition to making their Employee Handbook available to employees on Respondents' intranet,[30] Respondents provide employees with either a printed copy or an electronic copy through email as part of their onboarding process,[31] and also provide the Employee Handbook to applicants who have been offered employment.[32]

Newmark Knight Frank's Director of Human Resources Lindsey Sherman drafted Respondents' Employee Handbook in a joint venture with Respondent Cantor's Human Resources Director Patricia Dreste and Respondent BGC's Global Head of Human Resources and Partnership Lori Pennay.[33]

Respondents assert that nothing in their joint Employee Handbook is considered confidential.[34] Nevertheless, Respondents marked the entire Employee Handbook as

[26] Tr. 55.

[27] Tr. 60; *see* Jt. Exh. 1.

[28] Tr. 59.

[29] Tr. 68.

[30] Tr. 51.

[31] Tr. 83.

[32] Tr. 31.

[33] Tr. 36, 57.

[34] Tr. 51, 60, 82.

confidential and marked it solely for internal use.[35] Respondents further asserted that it makes its Employee Handbook available to applicants for employment as well as "anybody [ ] who asks for it for a legitimate purpose."[36] Respondents also testified that the Employee Handbook is an "internal work product, that [Respondents] don't post it out on the public internet,"[37] or provide to competitors.[38]

On direct examination, Respondents provided testimony through Director of Human Resources Sherman regarding the purposes behind the contested rules.[39] Respondents' testimony will be discussed more thoroughly below as it pertains to each respective rule.

V. ARGUMENT

In *The Boeing Company*,[40] the Board held that, when evaluating rules that, when reasonably interpreted, would potentially interfere with employees' rights under Section 7 of the Act, it will balance the nature and extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule.[41] The Board has made clear that parties may present evidence about the reasons for adopting rules.[42] The Board may also take into consideration particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights.[43] In conducting this balancing, "when a rule, reasonably interpreted, *would* prohibit or interfere with the exercise of

[35] *See* Jt. Exh. 1.

[36] Tr. 51.

[37] Tr. 50.

[38] Tr. 84.

[39] Tr. 33-52.

[40] 365 NLRB No. 154, slip op. at 2 (2017) (*Boeing Co.*).

[41] *Boeing Co.*, at slip op. at 3.

[42] *Id.* at slip op. at 15.

[43] *Id.* at slip op. at 16.

NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful."[44]

As discussed below, an application of these standards establishes that maintenance of the above-referenced policies in Respondents' Employee Handbook interferes with, restrains, and coerces employees in the exercise of their Section 7 rights, including, but not limited to, their right to participate in protected concerted activity and their right to communicate with each other about their terms and conditions of employment.

A. Respondents' Confidentiality Notice Unlawfully Restricts Section 7 Activity

1. The Confidentiality Notice

Respondents' confidentiality notice on each page of Respondents' joint Employee Handbook states:

> *Cantor/BGC/NGKF Handbook effective as of May 1, 2014 (as amended from time to time)*
> *Confidential—For Internal Use Only*[45]

2. Analysis

It is well-established that employees have the right to communicate with third parties, including labor organizations, government agencies, and the public, about their wages, hours, and other terms and conditions of employment in furtherance of the exercise of their Section 7 rights.[46] Respondent's designation of its entire employee handbook as "Confidential—For Internal Use Only" directly interferes with the right of employees to disclose the employee handbook and its many provisions governing their terms and conditions of employment to third

[44] *Id.*

[45] Jt. Exh. 1, passim.

[46] *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 n. 1 (1990), citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

parties in furtherance of Section 7 activities. For instance, when reasonably read, the policy would prohibit employees from disclosing the handbook or the policies therein to a labor organization seeking to organize or assist them, to the Board as part of an unfair labor practice investigation, to any other government agency investigating concerted claims, or to the media for the purpose of publicizing a labor dispute. Although Respondents contend that their Employee Handbook does not contain confidential information and was merely marked confidential as an "administrative note,"[47] there is no indication anywhere in the handbook that communicates any limits to the blanket confidentiality requirement. Moreover, employees would not be free to interpret such language loosely and risk discipline or termination.[48] Respondent fully acknowledges that the purpose behind marking a document confidential, as footnoted throughout the Employee Handbook, is to prevent the disclosure of said document.[49] Respondents further testified that in regards to confidential documents, Respondents require employees to sign confidentiality agreements.[50] Similarly, employees must sign that they have received, read, and agreed to Respondents' Employee Handbook.[51] Thus, the designation of the Employee Handbook as "Confidential—For Internal Use Only" directly interferes with Section 7 rights.

On the other side of the balance, Respondents have not asserted any legitimate business interest justifying its apparent blanket prohibition on disclosure of its Employee Handbook. In fact, Respondent's admission that the Employee Handbook does not contain confidential information and was merely marked confidential as an "administrative note" [52] conclusively

[47] Tr. 50, 85.

[48] Tr. 68.

[49] Tr. 60.

[50] Tr. 51-52.

[51] Tr. 61.

[52] Tr. 50, 85.

demonstrates that Respondents cannot identify any legitimate business interest that outweighs the Section 7 interests directly impacted by the rule.

CGC therefore respectfully requests that the ALJ find that Respondents' designation of their Employee Handbooks as "Confidential—For Internal Use Only" interferes with, restrains, and coerces employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

C. Respondents' Rule Concerning Reference Inquiries and Requests for Employee Information Unlawfully Restricts Section 7 Activity

1. The Rule Concerning Reference Inquiries and Requests for Employee Information

Section 403 of Respondents' Employee Handbook, titled, "Reference Inquiries and Requests for Information," included in the handbook's Employment Application and Personnel Records section, provides:

> All requests for information regarding a current or former Company employee must be forwarded to the Human Resources Department for response. Should an employee (including managers and supervisors) receive a written or verbal request for a reference, the employee should direct the individual seeking information (without any on or "off the record" statement), or forward the written request, immediately to the Human Resources Department. […]
>
> No Company employee may provide a written reference for or supply employee information regarding any current or former employee without the permission of the Human Resources Department. Under no circumstances should any Company employee release any information about any current or former Company employee orally.
>
> […][53]

2. Analysis

Employees' right to communicate with others about their terms and conditions of employment encompasses the right to disclose coworkers' names and contact information to a

[53] Jt. Exh. 1, Section 403.

labor organization in furtherance of an organizing effort or to other employees in aid of protected concerted activities.[54] Thus, applying a balancing framework similar to the one later adopted in *The Boeing Company,* Board Member Miscimarra repeatedly found that rules prohibiting disclosure of information about employees were unlawful because they directly interfered with the central Section 7 activity of engaging in protected concerted activity involving disclosure of such information. [55]

Here, Respondents' rule directly interferes with this central right. Its title, "Reference Inquiries and Requests for Information," conveys that it applies not only to requests for references by prospective employers, potential lenders, and the like, but also to all requests for information by any inquirer to any employee of Respondents. The rule further provides that "All requests for information regarding a current or former Company employee must be forwarded to the Human Resources Department for response," again, regardless of the source or inquirer. It then prohibits any "Company employee," regardless of position or responsibilities, from "supply[ing] employee information regarding any current or former employee without the permission of the Human Resources Department" or "releasing any information about any current or former Company employee orally." This sweeping language unquestionably encompasses employees' disclosure of any information about themselves or other employees, regardless of their responsibilities or the manner in which they obtained the information, to

[54] *See Ridgely Mfg. Co.*, 207 NLRB 193, 196-97 (1972) (employee right to obtain names of coworkers from timecards), *enfd.*, 510 F.2d 185 (D.C. Cir. 1975).

[55] *See Victory Casino Cruises II*, 363 NLRB No. 167, slip op. at 8 (2016) (Member Miscimarra, concurring) (finding unlawful rule classifying "all information about present or past employees to be confidential" as the blanket prohibition would encompass protected concerted activity); *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 n.1 (2015) (Member Miscimarra, concurring) (unlawful rule listing information about employees as confidential); *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5 (2016) (Member Miscimarra, concurring) (rule that prohibited employees from disclosing "salaries, contents of employment contracts, [and] . . . staff addresses and phone numbers" and from engaging in the "personal use of such information," and that also prohibited employees from disclosing to "any media source" information "regarding [employees'] employment at [the employer], the workings and conditions of [the employer], or any . . . staff member," was unlawful under Member Miscimarra's *William Beaumont Hospital* test).

anyone. Thus, the rule would prohibit employees from disclosing any information about themselves and other employees to a labor organization seeking to organize or assist them, to the Board as part of an unfair labor practice investigation, to any other government agency investigating concerted claims, or to the media for the purpose of publicizing a labor dispute.

Respondents' sole witness testified that Respondents' rule is intended to address external requests to Respondents' human resources or legal department.[56] More specifically, the policy's purpose is to protect employee information such as "compensation information, home address information, email address, contact information" from disclosure.[57] Respondents also expressed a concern with the inadvertent disclosure of client information along with the disclosure of employee compensation information.[58] Though Respondents expressed that the rule was intended to limit responses "on behalf of the company," Respondents acknowledged that, as written, there is no indication that the restrictions on disclosing employee information are intended solely for the Respondents and not employees.[59]

Although Respondents may have an interest in controlling what information is disclosed by its human resources or legal department on its behalf, that interest does not justify the far broader scope of their rule, which, on its face, encompasses and prohibits a broad array of Section 7 activities.[60] CGC therefore respectfully requests that the ALJ find that Respondents' maintenance of their rule concerning Reference Inquiries and Requests for Employee

[56] Tr. 40.

[57] Tr. 41.

[58] *Id.*

[59] Tr. 63-65.

[60] *Victory Casino Cruises II*, 363 NLRB No. 167, slip op. at 8 (Member Miscimarra, concurring) ("Although the Act does not protect every disclosure of information concerning employees' compensation, discipline, or other terms and conditions of employment, a blanket prohibition is unlawful because it encompasses situations when such disclosures would be protected.").

Information interferes with, restrains, and coerces employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

D. Respondents' Press Inquiries and Other Information Requests Policy Unlawfully Restricts Section 7 Activity

1. The Press Inquiries and Other Information Requests Policy

Section 804 of Respondents' Employee Handbook, titled, "Press Inquiries and Other Information Requests," included in the handbook's General Guidelines section, provides:

> [. . .]
>
> Legal and Regulatory Information Requests: All requests, whether in writing or oral, from government agencies, legal counsel, self-regulatory organizations or similar entities or persons for information from the Company should be immediately directed to the Director of Compliance or General Counsel. Under no circumstances should an employee or contractor attempt to respond without prior clearance and authorization. Failure to comply with this policy will subject the employee to disciplinary action, up to and including termination of employment. […][61]

2. Analysis

It is well-established that employees have the Section 7 right to communicate with the Board and, also, to communicate with other government agencies in furtherance of Section 7 aims.[62] As written, Respondents' rule concerning Press Inquiries and Other Information Requests directly interferes with the right of employees to participate in Board investigations or investigations by other government agencies investigating concerted claims. Its title, "Press Inquiries and Other Information Requests" explicitly conveys that it is intended not only to apply to inquiries by the press, but also to other kinds of requests for information. Its content requires

[61] Jt. Exh. 1, Section 804.

[62] See *Frank Briscoe Incorporated*. 247 NLRB 13 (1980); *Dawson Cabinet Company, Inc.*. 228 NLRB 290 (1977), *reversed*, 566 F.2d 1079 (8th Cir. 1977); *Leviton Manufacturing Company, Inc.* v. *NLRB* 486 F.2d 686, 689 (1st Cir 1973); *GVR, Inc.*. 201 NLRB 147 (1973); *Marathon Oil Company*, 195 NLRB 365, 367-368 (1972), *enfd.*, 478 F.2d 1405 (7th Cir. 1973); *B & M Excavating, Inc*., 155 NLRB 1152, 1154 (1965), *enfd.*, 368 F.2d 624 (9th Cir. 1966); *Socony Mobil Oil Co.* v. *N.L.R.B.*. 357 F.2d 662 663-664 (2d Cir. 1966) (ship safety complaint to U.S. Coast Guard: *Walls Manufacturing Company* v. *N.L.R.B.*, 321 F.2d 753 (D.C. Cir. 1973), *cert. denied*, 375 U.S. 923 (1963).

that "[a]ll requests" from "government agencies" and the like "be immediately directed to the Director of Compliance or General Counsel," and provides that "[u]nder no circumstances should an employee or contractor attempt to respond without prior clearance and authorization," under pain of disciplinary action, up to and including discharge. Although Respondents' may argue that the rule is intended to control what information is disclosed on their behalf, the rule is not limited to disclosure of information on Respondents' behalf. And, in fact, Respondents acknowledge that, as written, the rule would prohibit an employee from disclosing a copy of the Employee Handbook to the Board, upon the Board's request.[63] Although, in response to their Counsel's leading questions, Director of Human Resources Sherman testified that the rule applies only to requests directed to Respondents to provide information from Respondents,[64] the rule does not state or imply that on its face and appears in an Employee Handbook containing rules generally applicable to all employees. In addition, although Respondents assert that, in practice, they would not consider disclosure of an employee handbook "a severe violation" or "an actionable" violation, it is not Respondent's enforcement of the rule, but what the rule says on its face and how employees would read it, that is at issue.[65]

Although Respondents assert that the rule is intended to ensure that only complete, accurate, and truthful information is provided to government agencies, for instance by ensuring that the current version of the Employee Handbook is provided, this interest does not outweigh the impact of Respondents' rule on employees' Section 7 right to respond to requests made directly to them as individuals by the Board and other government agencies. Respondents' restriction has a serious impact on the central right of employees to participate in Board

[63] Tr. 68-69, 81.

[64] Tr. 81.

[65] Tr. 68.

investigations and government investigations of other concerted claims. It entirely eliminates the ability of employees to respond to inquiries by government agencies confidentially by requiring them to refer all such requests to Respondents. Moreover, it gives Respondents license to decide whether employees can participate in government investigations, including investigations of Board charges and government investigations of other concerted claims, at all. On the other side of the balance, Respondents' asserted interest in ensuring completeness, accuracy, and truthfulness is undercut by the fact that Respondents could clear up anything it considered to be an incomplete production, inaccuracy, or untruth by responding on their own behalf to a government agency's inquiries of Respondents.

CGC therefore respectfully requests that the ALJ find that Respondents' maintenance of their rule concerning Press Inquiries and Other Information Requests interferes with, restrains, and coerces employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

E. Respondents' Cooperation in Investigations and Litigation Policy Unlawfully Restricts Section 7 Activity

1. The Cooperation in Investigations and Litigation Policy

Section 805 of Respondents' Employee Handbook, titled, "Cooperation in Investigations and Litigation," included in the handbook's General Guidelines section, provides:

> Employees and contractors are required to cooperate with the Company with respect to internal investigations and the defense or prosecution of claims filed, threatened against, or under consideration by the Company, its affiliates, directors, shareholders, officers, or employees, by providing truthful information or testimony in interviews, meetings or proceedings. […] In the event the investigation or claim involves allegations made by the employee or the contractor against the Company, the employee or contractor will be required to provide information that the Company views as necessary to its internal investigation of the claim, but will not be required to provide assistance to the Company in its defense or prosecution of the claim.

2. Analysis

Requirements that employees cooperate with management during investigations and litigation infringe on employees' Section 7 rights by permitting conduct amounting to interrogation under *Johnnie's Poultry*,[66] insofar as it permits the employer to coerce employees, under threat of discipline, to cooperate with Respondents' investigations of unfair labor practices or other concerted claims.[67] When an employer interviews an employee about protected activity in preparation for an unfair labor practice hearing, "the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis."[68] "The Board has held that compliance with *Johnnie's Poultry* safeguards constitutes the minimum required to dispel the potential for coercion in cases where an employer questions employees in preparing for a Board hearing."[69]

Respondents' rule requires employee cooperation, despite the inherent danger of coercion, during investigations and litigation of unfair labor practices without safeguards minimizing the coercive impact. The rule as written, and as further explained by Respondents, requires employees to participate in company investigations into claims filed with government agencies, including the Board.[70] While Respondents assured that claimants are not required to cooperate with Respondents in investigations related to their own claims, Respondents were

[66] 146 NLRB 770 (1964).

[67] *Beverly Health and Rehabilitation Services, Inc.*, 332 NLRB at 348-49 (2000); *United States Postal Service*, JD (SF)-07-18 (2018).

[68] *Tschiggfrie Properties, LTD*, 365 NLRB No. 34 (2017) (citing *Johnnie's Poultry Co.*, 146 NLRB 770, 774-775 (1964), *enf. denied* 344 F.2d 617 (8th Cir. 1965)).

[69] *Id.* (citing *Albertson's, LLC*, 359 NLRB 1341, 1343 (2013) (internal quotations omitted), affd. and incorporated by reference in 361 NLRB No. 71 (2014); *see also Freeman Decorating Co*., 336 NLRB 1, 19 (2001) (stating that the Board takes a "bright-line approach" in enforcing the Johnnie's Poultry safeguards), *enf. denied on other grounds sub nom. Stage Employees IATSE v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003)).

[70] Tr. 69.

clear that witnesses to the allegations are required to cooperate.[71] Requiring employees cooperate in investigations and litigation directly interferes with the requirement that an employer give assurances to employees that participation in questioning related to Section 7 rights to prepare to respond to unfair labor practice charges or other legal claims is voluntary and that their refusal to cooperate will not result in reprisals. As such, it is directly at odds with the Board's safeguard requirements under *Johnnie's Poultry*.

CGC therefore respectfully requests that the ALJ find that Respondents' maintenance of their rule concerning Cooperation in Investigations and Litigation interferes with, restrains, and coerces employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

F. Respondents' Personal Appearance Policy Unlawfully Restricts Section 7 Activity

1. The Personal Appearance Policy

Section 811 of Respondents' Employee Handbook, titled, "Personal Appearance Policy," included in the handbook's General Guidelines section, provides:

> * * *
>
> While not a comprehensive listing, the following are examples of acceptable and unacceptable business casual attire and are meant to act as a guideline to help you determine whether or not you are dressed appropriately or inappropriately to represent the Company:
>
> * * *
>
> Inappropriate
>
> * * *
>
> • Any clothing with printed slogans/promotions

[71] Tr. 69-70.

2. Analysis

It is well settled that an employer violates Section 8(a)(1) of the Act when it prohibits employees from wearing union insignia at the workplace, absent special circumstances.[72] The Board has stressed that the special circumstances exception is narrow, and a rule that curtails an employee's right to wear union insignia at work is presumptively invalid.[73] Special circumstances include situations where display of union insignia might "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees."[74] The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia.[75] Nor is the requirement that employees wear a uniform a special circumstance justifying a button prohibition.[76] Finally, the fact that the prohibition applies to all buttons, not solely union buttons, is not a special circumstance.[77]

As written, the rule explicitly restricts employees from wearing "[a]ny clothing with printed slogans/promotions." Contrary to Respondents' contentions, the unlimited prohibition, as written and without clarification, includes union insignia and other insignia or messages

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[72] *In-n-Out Burger, Inc*. 365 NLRB No. 39 (2017); *Boch Honda*, 362 NLRB No. 83 (2015), *enf. sub nom. Boch Honda v. NLRB*, ___F.3d___ (1st Cir. 2016) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enfd. mem. 511 F.2d 527 (6th Cir. 1975)); *see also Albertson's Inc*., 351 NLRB 254, 256-257 (2007); *see also Albis Plastics*, 335 NLRB 923, 924 (2001). The Board has continued to apply this standard, which involves a balancing of interests similar to the one adopted in *The Boeing Company*, following the issuance of *The Boeing Company*. See *Long Brach Memorial Medical Center, Inc.*, 366 NLRB No. 66, slip op. at 1-4 (2018).

[73] *Quantum Electric, Inc*., 341 NLRB 1270 (2004).

[74] *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enfd.* 99 Fed. Appx. 233 (D.C. Cir. 2004), citing *Nordstrom, Inc.* 264 NLRB 698, 700 (1982).

[75] *Meijer, Inc.*, 318 NLRB 50 (1995), *enfd*. 130 F.3d 1209 (6th Cir. 1997); *Nordstrom, Inc.*, 264 NLRB at 700.

[76] *United Parcel Service*, 312 NLRB 596, 596-598 (1993), *enf. denied* 41 F.3d 1068 (6th Cir. 1994).

[77] *Harrah's Club*, 143 NLRB 1356, 1356 (1963), *enf. denied* 337 F.2d 177 (9th Cir. 1964); *Floridan Hotel of Tampa*, 137 NLRB 1484 (1962), *enfd. as modified* 318 F.2d 545 (5th Cir. 1963).

supporting Section 7 aims. Respondents assert that their personal appearance policy is intended to provide guidelines to employees of what is acceptable to wear during their employment.[78] Respondents go on to state that the policy is intended to prohibit employees from wearing clothing that promotes a product or service through slogans, promotions, or advertisements.[79] Respondents also added a clarifying distinction that clothing containing a brand's name, such as the Nike brand, or a Union slogan would not violate its rule.[80] However, a Coca-Cola shirt, or a Mickey Mouse shirt, is inappropriate regardless of it being a T-shirt or a button-up shirt, because it would not present a professional atmosphere.[81] Similarly, a shirt with Mickey Mouse holding up a union slogan in favor of unionizing would also be inappropriate.[82] In an attempt to clarify, Respondents provided a contradictory explanation for banning a Mickey Mouse shirt with a union slogan, namely that an individual "who is wearing a T-shirt or a button-up shirt or whatever that has a union slogan on it is [not] advertising a product or service."[83]

Although Respondents sought to limit and qualify its rule through testimony presented at trial, an employee reading the rule would see only the rule, which, on its face, encompasses and prohibits union insignia and other insignia or messages supporting Section 7 aims. The rule does not contain any limitation to on slogans or promotions to those that promote a product or service.[84] Respondent's general interest in ensuring employees know what is acceptable to wear and preventing promotion of products and services is not a special circumstance justifying maintenance of Respondent's rule. Although Respondents employ a broad array of employees in

[78] Tr. 48.

[79] *Id.*

[80] Tr. 48-49.

[81] Tr. 72.

[82] *Id.*

[83] Tr. 72-73.

[84] Tr. 73.

a broad array of industries, Respondents did not present any evidence establishing any specialized need for employees in any job classification or industry to refrain from clothing wearing "printed slogans/promotions."

CGC therefore respectfully requests that the ALJ find that Respondents' maintenance of their Personal Appearance Policy interferes with, restrains, and coerces employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

VI. A NATIONWIDE POSTING REMEDY IS NECESSARY AND APPROPRIATE TO EFFECTUATE THE PURPOSES OF THE ACT

As made clear by CGC in its Complaint and the stipulations entered into by CGC and Respondents, CGC seeks a nationwide posting to remedy Respondents' maintenance of the unlawful rules. More specifically, CGC requests that Respondents "post at its places of business nationwide any Notice to Employees that may issue in this proceeding." Where an employer has maintained unlawful policies contained in a handbook distributed to its business locations nationwide, a nationwide posting remedy is appropriate. The Board has "consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect."[85] As the D.C. Circuit noted, "only a company-wide remedy extending as far as the company-wide violation can remedy the damage."[86]

[85] *Guardsmark, LLC*, 344 NLRB 809, 812 (2005).

[86] *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 381 (D.C. Cir. 2007); *see also, First Transit, Inc.*, 360 NLRB No. 72 (2014) (ordering nationwide posting to remedy unlawful handbook rules and orally promulgated rules); *Longs Drug Stores California*, 347 NLRB 500, 501 (2006)(ordering posting at all facilities where unlawful policy is or has been in effect); *Fresh & Easy Neighborhood Market, supra* at *4 (ordering a nationwide posting to remedy unlawful rules violations); *DirectTV U.S. DirecTV Holdings, LLC, supra* at *6 (same); *Wal-Mart Stores, Inc.*, 352 NLRB 815, 849 fn.17 (2008) (two-member Board panel) (ALJ citing cases regarding the appropriateness of a nationwide posting remedy); *La Quinta Motor Inns, Inc.*, 293 NLRB 57, 57-58, 62 (1989).

VII. CONCLUSION

Through the policies in their joint Employee Handbook, Respondents interfere with employees' ability to communicate with each other regarding terms and conditions of employment and otherwise unlawfully restrict employees' right to engage in protected activity. Based on the foregoing reasons, CGC submits that Respondents have violated Section 8(a)(l) of the Act as alleged in the Complaints, as amended. CGC respectfully urges the ALJ to find that Respondents violated Section 8(a)(1) of the Act as alleged and order all such relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Specifically, CGC seeks a remedy which would require Respondents to: cease and desist from maintaining its Confidentiality footnote and the rules and polices discussed above in their Employee Handbook; notify all applicants and current and former employees who were subject to the Employee Handbook that the rules and polices discussed above have been rescinded or revised and, if revised, provide them a copy of the revised version; and post a notice at all locations, including by electronic means. Under applicable Board law, such remedies are appropriate.

Dated at Phoenix, Arizona this 25th day of July 2018.

Respectfully submitted,

/s/ N.M. Zárate Mancilla

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in *BGC Partners, Inc.*, Case 28-CA-195500 and *Cantor Fitzgerald, LP*, Case 28-CA-195506 was served by E-Gov, E-Filing, and E-mail on this 25th day of July 2018, on the following:

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